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88-5158 (10)

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QUESTIONS PRESENTED FOR REVIEW

DOES FEDERAL MAGISTRATES ACT AUTHORIZE A DISTRICT JUDGE, OVER CRIMINAL DEFENDANT'S OBJECTION, TO DELEGATE SELECTION IN FELONY TRIAL TO MAGISTRATE WHILE RESERVING AUTHORITY TO REVIEW DE NOVO MAGISTRATE'S RULINGS ON CHALLENGES FOR CAUSE?

DOES DISTRICT JUDGE'S DELEGATION OF JURY SELECTION TO MAGISTRATE, WITH RESERVATION OF DE NOVO REVIEW AUTHORITY CONCERNING UNSUCCESSFUL DEFENSE CHALLENGES FOR CAUSE, VIOLATE FELONY DEFENDANT'S ARTICLE III AND DUE PROCESS RIGHTS?

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TO THE HONORABLE SUPREME COURT:

Diego Chavez-Tesina petitions for review of the judgment and opinion of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The published opinion and order of the Court of Appeals affirming the judgment and conviction appears in Appendix, United States of America -V- Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, Hugo Shanks-Carrera, William Salazar, Docket Nos. 87-1243, 87-1244, 87-1245, 87-1246, 87-1264.

JURISDICTION

The court of appeals had jurisdiction of Petitioner's direct appeal by virtue of 28 U.S.C. 1291. It entered its opinion on June 1, 1988.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> "No person shall. . .be deprived of life liberty, or property, without Due Process of law."

Article III Section 1:

> "Judicial Power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish."

STATUTORY PROVISIONS INVOLVED

Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, reprinted in 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. Section 631-639 (1982 & Supp. III 1985).

STATEMENT OF THE CASE

This Petition is taken pursuant to a judgment of conviction entered on the 14th day of May 1987 in the United States District Court for the Eastern District of New York (McLaughlin, J.), sentencing him to concurrent terms of Twenty years on his conviction of operating a racketeering enterprise in violation of 18 U.S.C. 1961, Five years on his conviction for violation of the Travel Act, 18 U.S.C. 1952 and two Fifteen year terms for conspiracy and possession of narcotics in violation of 21 U.S.C. 841 and 846 followed by lifetime parole and the Second Circuit Court of Appeal's affirming all of the judgments of the District Court.

STATEMENT OF THE FACTS

Petitioner's convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Speal Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to William Salazar. Salazar and Garcia sold de la Cova two-eights of kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers.

Salazar mentioned that his business partner, a Columbian of Japanese descent who lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched this Petitioner, who was a resident of New York. In New Orleans, another DEA agent, Douglas Krockenberger, was engaged in a separate undercover operation and encountered this Petitioner, who allegedly told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to this Petitioner's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved this Petitioner. On February 6, 1986 Salazar sold one-eight of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted Beimar Vallejo and said that he had something "very, very good." Salazar telephoned Adela Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their personal use.

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. At this point Shanks-Carrera was observed going inside the building with a duffel bag. When Salazar and de la Cova arrived, Salazar entered the building to make sure

that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine--the agreed-upon first installment. This Petitioner and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar--and verifying that that transaction involved cocaine--as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21 -count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five individuals were on nine counts of the indictment, the broadest of which alleged that Salazar and this Petitioner conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. Section 1962(c) (1982) (Count 2). Salazar, this Petitioner, and Shanks-Carrera were charged with conspiracy to possess with intent to distribute and possession with intent to distribute 50 Kilograms of cocaine under 21 U.S.C. Sections 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the accused individuals dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. Sections 841, 846 (1982 & Supp. IV 1986); (1) conspiracy and substantive counts against Garcia and Salazar arising

out of the January 15th sale of two-eights of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale on one-eight of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, this Petitioner was charged with interstate travel in aid of racketeering under 18 U.S.C. Section 1952 (1982 Supp. IV 1986) Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and this Petitioner. Thus, the RICO count incorporated the remaining counts against all of the accused.

The accused individuals moved unsuccessfully for severance pursuant to Federal Rules of Criminal Procedure 8(b), and 14. After jury selection--presided over by a magistrate--trial commenced on February 17, 1987 and concluded with the accused convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; this Petitioner for narcotics rackerteering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with the intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. It should be specifically noted by this Court that Shanks-Carrera was acquited on the conspiracy charge.

ARGUMENT

This Most Honorable Court is respectfully requested to adopt, in Petitioner Chavez-Tesina's case, the Fifth Circuit en banc Court's position condeming the practice of permitting a magistrate to conduct jury voir dire, especially over his objection, in his felony case, in that such practices most certainly raises serious constitutional questions which this Court is asked to resolve at this time. This Petitioner request that this Court be aware of the fact that the selection of his petit jury, for the purpose of trying his felony case, carried with it both particular and systemic importances. It implicated not only this Petitioner's Fifth and Sixth Amendment rights and provided the foundation upon which the remainder of his trial was built, but was essential, because, he submits, the impartially of the adjudicator goes to the very integrity of the legal system which was responsible for stripping him of a substantial amount of his liberty.

The broad powers given federal magistrates by the Magistrates Act, 28 USC 631-39, do not include the authority to conduct voir dire, Petitioner submits. Voir dire is not specifically mentioned in the statute, Petitioner points out; nor does the statute constitute a "pretrial matter" that the magistrate may hear and determine under Section 636(b)(1)(A) or an "additional duty" under 636(b)(3). Therefore because the magistrate exceeded his statutory powers in conducting the "traditional adjudicatory duty" of presiding over Petitioner Chavez-Tesina's jury selection this Most Honorable Court is respectfully requested to reverse the lower Courts judgement in that Petitioner properly raised the issue at the trial level, by vehemently objecting to the improper use of the magistrate by the court for the purpose of selecting his petit jury.

The process of voir dire is especially significant, Petitioner contends, not only is the peremptory challenge a necessary part of trial by jury, Swain V. Alabama, 380 U.S. 202, 219 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. Batson V. Kentucky, 476 U.S. 79, 88-89 (1968). And while double jeopardy does not attach until the jury is sworn, Crist V. Bretz, 437 U.S. 28, 35 (1978), the Sixth Amendment rights of Petitioner to a speedy and public trial, accord Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986), to be present while his jury was being selected, Lewis V. United States, 146 U.S. 370, 376 (1892); United States V. Crutcher, 405 F. 2d 239, 242-43 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969); Fed. R. Crim. P. 43(a), and to the assistance of counsel during jury selection, see Brewer V. Williams, 430 U.S. 387, 399 (1977), all attached before or at the time his jury selection began. Petitioner submits that since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," Smith V. Phillips, 455 U.S. 209, 217 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

The Magistrates Act of 1968, 1968 U.S. Code Cong. & Admin. News 1280 (current version at 28 U.S.C. §§ 631-639), abolished the system of United States Commissioners, replacing it with a system of United States Magistrates. The Act required that all magistrates be attorneys if possible, eliminated the "anachronistic fee system of compensation," gave magistrates a secure eight-year term, and expanded their jurisdiction. H.R. Rep. No. 1629, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 4252, 4254.

Section 636 of the Act, which defined magistrates' powers, empowered magistrates to try petty criminal offenses, generating considerable debate over whether magistrates could do so consistently with Article III. See, e.g., id., reprinted in 1968 U.S. Code Cong. & Admin. News at 4266-70 (dissenting views of Mr. Cahill). Chief Justice Burger noted that the Judicial Conference of the United States objected to § 636 in its entirety, "fearing it so broad as to be subject to constitutional attack." Wingo V. Wedding, 418 U.S. 461, 484, 94 S. Ct. 2842, 2855, 41 L. Ed. 2d 879 (1974)(Burger, C.J., dissenting). Throughout the debate, there was no suggestion that the Act authorized magistrates to conduct the trial of other than petty offenses. The implicit assumption was that magistrates presiding over the trial of felonies was not envisioned, to a certainty--despite the presence of the additional duty language now alleged to allow magistrates to preside over jury selection in felony cases.

The Magistrates Act was not changed in any relevant way until 1976. In 1974, this Court held that magistrates could not conduct evidentiary hearings in a petition for federal habeas corpus filed by a state prisoner because it was "inconsistent with the . . . laws of the United States" within the meaning of the Federal Magistrates Act. Wingo, 418 U.S. at 472, 94 S. Ct. at 2849. More specifically, this Court held that the Habeas Corpus Act as consolidated into 28 U.S.C. § 2243 required decisions by an Article III Judge. But this Court did not rest there, explaining, "We conclude further that (Local Rule 16) is to that extent invalid because, as we construe § 636(b) that section itself precludes district judges from assigning magistrates the duty of conducting evidentiary hearings." This Court looked to the legislative history and concluded that Congress did not intend in the 1968 Act that magistrates conduct evidentiary hearings. It rejected the suggestion that evidentiary hearings could be assigned under the language of additional duty.

It is then plain that "additional duty" has never been seen as a primary grant of power. Congress responded to Wingo by adding a new section, purposely avoiding changing the additional duty language. Consequently Petitioner Chavez-Tesina would ask this Court to adopt the exact same position in the instant case and forbid district Judges from assigning to a magistrate the task of presiding over jury selection where the defendant objects to such practices.

The 1976 amendment revised the magistrates' powers into four parts, providing in the first that a judge can designate a magistrate "to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, and to suppress evidence in a criminal case. . . ." 28 U.S.C. § 636(b)(1)(A). Significantly, Congress provided that a judge may reconsider the matters referred under this grant "where it has been shown that the magistrate's order is clearly erroneous or contrary to law." id..

In this new first part, Congress also allowed district judges to designate magistrates "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations . . . for any motion." 28 U.S.C. § 636(b)(1)(B). Finally it detailed a system by which "a judge of the court shall make a de novo determination of those portions of the (magistrate's) report . . . to which objection is made." 28 U.S.C. (b)(1).

In the second part, Congress gave to district judges the power to appoint a special master to serve in civil cases upon consent of the parties. 28 U.S.C. § 636(b)(2).

Congress purposely retained the additional duty provision from the Magistrates Act of 1968 as the third part without relevant change in language and without mentioning either the mechanics or the standard for review by a judge of any additional duty assigned to a magistrate. 28 U.S.C. § 636(b)(3). Intending that courts be innovative in their use of magistrates, Congress suggested that "district courts would remain free to experiment in tha assignment of other duties to magistrates which may not necessarily be included in the broad category of 'pretrial matters.'" H.R. Rep. No. 1609, 94 Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6172. However, this legislative entreaty was in a quest for "increased time available to judges for the careful and unhurried performance of their vital and traditional adjudicatory duties." id.

Finally, Congress in the fourth part detailed for the first time procedures and circumstances under which magistrates could, with the consent of the parties, try civil cases. 28 U.S.C. § 636(c).

In its consideration of the Magistrates Act of 1968 and its amendment in 1976, Congress was wary of the strictures of Article III and the demands of due process. That sensitivity proved to be well-founded. The 1976 amendment granting district judges the power to delegate to magistrates the determination of dispositive motions, such as motions to suppress was promptly challenged, reaching this Court in 1980. United States V. Raddatz, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980). Congress had carefully provided for de novo determination by district judges of proposed rulings on dispositive motions, convinced that this superintendence resolved any Article III concerns. A divided court in Raddatz agreed. Three justices dissented, with Justices

Blackmun and Powell writing special concurrences. The dividing issue was whether judicial superintendence essential to Article III placement of judicial power required that a district judge hear the evidence anew when a challenged ruling on a dispositive motion turned on credibility findings. Four justices thought such review essential. In any event, there was no disagreement that congressional concern over the limiting force of Article III prompted the detailing of review procedures for pretrial dispositive motions in criminal cases.

The Raddatz majority responded to the observation that such pretrial decisions can be just as determinative as many trial rulings by emphasizing the difference between pretrial and trial proceedings. In distinguishing pretrial from trial matters the Raddatz majority observed that the "Court on other occasions has noted that the interests at stake in a suppression hearing are of a lesser magnitude than those in criminal trial itself", id. at 679, 100 S. Ct. at 2414, and pointed out that "a defendant who has not prevailed at the suppression hearing remains free to present evidence and argue to--and may persuade--the jury that the confession was not reliable and therefore should be disregarded." id. at 678, 100 S. Ct. at 1413-14 (footnote omitted). Justice Marshall, with whom Justice Brennan joined, urged that the Act would violate Article III and deny due process unless construed to require that an Article III judge hear the testimony anew when credibility was at issue. Id. at 694-95, 100 S. Ct at 2422 (Marshall, J., dissenting). Justice Powell agreed that, in such circumstances, due process would require a fresh hearing. Id. at 686, 100 S. Ct. at 2418 (Powell, J., concurring in part and dissenting in part). Finally, Justice Stewart, joined by Justices Marshall and Brennan, read the Act to require a fresh hearing. Id at 692, 100 S. Ct. at 2420 (Stewart, J., dissenting).

Raddatz furnishes two relevant insights. First, if Congress intended that magistrates could be assigned the additional duty of presiding over the

trial of felony cases, the struggle over petty offenses in the 1968 Act and the concerns over pretrial ruling authority, explicitly provided for, would make no sense. Similarly, if the Court believed that to be the intent of Congress, the Raddatz majority's effort distinguish pretrial and trial would be superfluous.

Petitioner Chavez-Tesina suggest that this Court need not decide whether Congress has the power to allow a district judge to delegate the trial of felony cases to a magistrate. It is sufficient here to simply observe that such a construction would pose grave constitutional issues. See generally Geras V. Lafayette Display Fixtures, 742 F. 2d 1037, 1045 (7th Cir. 1984)(Posner, J., dissenting); see also Comment, The Boundaries of Article III: Delegation of final Decisionmaking Authority to Magistrates, 52 U. Chi. L. Rev. 1032 (1985); Comment, Is the Federal Magistrate Act Constitutional After Northern Pipeline? 1985 Ariz. St. L. J. 189. This Court is obligated, of course, to read statutes to avoid constitutional difficulty. Relatedly, this Court should insist upon clear congressional expression when the reach of claimed reading provokes issues regarding constitutionally mandated spheres of governmental power. For example, "This Court consistently has required an unequivocal expression that Congress intended to override Eleventh Amendment immunity. . . ."Welch V. State Dep't of Highways & Pub. Transp., -- U.S. __, __, 107 S. Ct. 2941, 2948, 97 L. Ed. 2d 389 (1987)(citation omitted). In short, this Court should not lightly engage such fundamental issues, but rather properly avoid them when it may fairly do so. Therefore it is contended, by Petitioner Chavez-Tesina, that this Court then should not be persuaded that Congress intended to grant to district judges the power to delegate the trial of felony cases themsel ..

But of course the defense of a magistrate presiding over jury selection does not rest on the assertion that an additional duty could include presiding

over trial of felonies. Rather, it is suggested that jury selection is sufficiently preliminary to the "trial" of a criminal case to escape constitutional concerns and difficulties of statutory construction attending the assertion that an additional duty may include presiding over the trial itself. Naturally Petitioner Chavez-Tesina sugge t that this Most Honorable Court should reject this effort to separate jury selection and trial for two reasons.

First, the Court is requested to see the selection of the jury as an essential component of the trial itself because, again, the impartiality of the adjudicator goes to the very integrity of the legal system. Second, even if viewed as a pretrial matter, the difficulties of review by an Article III judge of a magistrate's rulings in jury selection--and the absence of a statutory procedure for that review in the face of explicit review procedures for other pretrial matters--should leave this Court unconvinced that Congress intended to allow delegation of this important task.

The selection of a petit jury from a venire is an important part of trial. At common law only the judge could preside over jury selection in felony cases. 4 William Blackstone, Commentaries *353. Its tie to trial is also illustrated by consistent judicial insistence upon its fairness as a component of trial. This Court has previously noted the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." Swain V. Alabama, supra. Only recently this Court has attempted to free the selection process of racial bias by prescribing a process for claims that the prosecutor is using peremptory challenges to exclude racial minorities. See Batson V. Kentucky, supra. Such concern plainly rejects the view that jury selection is a preliminary and and essentially ministerial act. At the least it is an essential instrument to

the delivery of a defendant's constitutionally secured right to a jury trial rooted in the commands of due process, ff not the trial guarantees of the Sixth Amendment and Section 2 of Article III themselves.

At some point the accusatory process shifts from a fact-gathering and charging phase to its primary task of deciding guilt. Petitioner Chavez-Tesina respectfully request that this Court not suggest there be a floating point on this issue. To do so would leave the flood gates open for potential abuse and continued litigation.

In Press-Enterprise Co. V. Superior Court, 464 U.S. 501, 509 n. 8, 104 S. Ct. 819, 823 n. 8, 78 L. Ed. 2d 629 (1984)(quoting United States V. Velazques, 490 F. 2d 29, 34 (2d Cir. 1973)); See also Gannett Co., Inc. V. DePasquale, 443 U.S. 368, 99 S. Ct. 2898, 61 L. Ed. 2d 608 (1979), this Court unanimously rejected the argument that jury selection is sufficiently preliminary and divorced from the trial's search for truth that it need not be open. This Court explained that "the process of juror selection is itself a matter of importance, not simply to the adversaries but to the criminal justice system." Id at 505, 104 S. Ct. at 821. The Court traced the history of jury selection noting its open character, from trials as early as the Norman Conquest. Of course, Press-Enterprise was an explication of first amendment rights. Tut the point here is that jury selection is and has been regarded as a critical part of trial; that the line between preliminary and trial issues, as currently seen, is not etched in one place for all purposes does not suggest otherwise.

Second, if seen as a preliminary matter, the superintendence by an Article III Judge of the magistrate's handling of jury selection would be difficult at best. While the Raddatz majority did not insist that a district

judge personally hear disputed testimony, it did insist an Article III judge have the right of de novo review--plenary power to reject findings and insist on a new evidentiary hearing. But, surely such power must be real and not illusory. Review of a trial judge's rulings on challenges to veniremen is difficult at best, as illustrated by the experience in administering the standards of Witherspoon V. Illinois, 391 U.S. 510, 88 S. Ct. 1770, 20 L. Ed. 2d 776 (1968). Witherspoon set the measure for veniremen's views regarding the death penalty in capital cases. The lower courts read Witherspoon to require de novo review of a state trial judge's rulings on challenges made in the course of jury selection. This proved to be a difficult task. See, e.g., O'Bryan V. Estelle, 714 F. 2d 365 (5th Cir. 1983), cert denied, 565 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984).

In Wainwright V. Witt, 469 U.S. 412, 105 S. Ct. 844, 83 L. Ed 2d 841 (1985) the court rejected the de novo standard in favor of the presumption of correctness standard of 18 U.S.C. § 225(d) (fairly supported by the record). The Court noted the difficulties of suca a de novo standard, concluding that "deference must be paid to the trial judge who sees and hears the juror." Wainwright 105 S. Ct. at 853. It pointed to Reynolds V. United States, 98 U.S. (8 Otto) 145 (1879), in which the Court observed:

> The manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below, but cannot always be spread upon the record. Care should, therefore, be taken in the reviewing court not to reverse the ruling below upon such a question of fact, except in a clear case. Wainwright, 105 S. Ct. at 854 n. 9 (quoting Reynolds, 98 U.S. (8Otto) at 156-157).

The Wainwright court also rejected the suggestion that a trial judge must make explicit findings in ruling on challenges for cause, recognizing the unique importance of sight and sound in the nigh intuitive judgments of a trial judge's rulings in the course of voir dire. Id., 105 S. Ct at 855. Squaring this difficulty with Raddatz's insistence upon superintendence by an Article III judge poses problems. An effort to engage in de novo review would be difficult and oftem impossible. Of course, we might conclude that a district court has the inherent power simply to conduct the voir dire a second time. But putting aside that such duplicative effort frustrates the very efficiency claims made in its support, such a power also faces serious practical problems in jury selection. The second voir dire or rehearing of testimony may never capture the original scene, and carrying a challenged venireman to a second interrogation before the district judge would be a delicate exercise at best. "The nature of the jury selection process defies any attempt to establish that an erroneous Witherspoon-Witt exclusion of a juror is harmless." Gray V. Mississippi, ___ U.S. at ___, 107 S. Ct. at 2055. Unlike dispositive pretrial motions, there is no opportunity to convince the jury afresh at trial.

This absence of statutorily-prescribed review gains no comfort by finding inherent power to review by a constitutionally adequate standard, because such a savings exercise fails to respond to the inquiry into congressional purpose--a purpose illuminated by the failure of Congress to detail a standard or process for review despite the demonstrated view of its importance. The relevant point is we ought not lightly attribute to Congress the purpose to enter this thicket with no provision for review, whether or not these practical problems might be surmounted.

In all of the decisions by Circuit Courts upholding a magistrate's presiding over jury selection, none of those decisions faced the necessity of treating voir dire as a preliminary rather than as part of trial; and significantly, none explained the necessity of the balance of the 1976 amendment if "additional duty" could carry its now claimed power. Moreover, none of the decisions expressed serious concern over the constitutionally of such acts. With respect, this Most Honorable Court is requested to see voir dire in a different light--and of such significant importance to trial that an Article III judge is constitutionally required. Petitioner Chavez-Tesina submits that this Court should agree that who decides the truth from the evidence is as important as the evidence itself. The process of selecting the individuals to hear the evidence inevitably introduces the trial players to the jury and itself triggers the decisional process. Consequently courts have secured, in the past, the rights to the selection process as an essential part of trial by jury and have struggled to eliminate bias in its function.

It is then difficult to view jury selection as fit fro delegation to magistrates as part of a congressional effort to free judges for performance of their "traditional adjudicatory duty." Rather, this Court must see jury selection as such an integral component of trial that it should not be persuaded that Congress envisioned its delegation to magistrates.

It is suggested that the sole limit of the congressional grant, by the additional duty section, of the power to delegate is that the delegation not violate another law or the Constitution. But as have been explained such a broad reading of congressional purpose would render superfluous the balance of the statute. By that reading, the additional duty language was all that was necessary. Fairly read in context, Congress never intended that this language

swallow all that preceded it. Additional duty is a residuum, granting the power to delegate any task not otherwise forbidden after we carve away that congery of duties that Congress never envisioned would be delegated. Petitioner Chavez-Tesina is not convinced that Congress intended to grant authority to judges to delegate to magistrates the authority to preside over felony trials and over activities integral to and intimately tied with trial.

Simply put, whatever the power of Congress may be, this Court should not be persuaded that Congress intended that "additional duty" included presiding over jury selection in felony cases. Therefore, it is respectfully requested by Mr. Chavez-Tesina that this Most Honorable Court make a finding that the district court erred in allowing the magistrate to preside over his jury selection, over his objection, and reverse his conviction remanding this matter back to the district court for a new trial.

Respectfully Submitted,

Diego Chavez-Tesina, Pro Se

CERTIFICATE OF SERVICE

I, Diego Chavez-Tesina, do say that on this date March 18, 1989, that I have caused to be deposited in the United States Mail Service two (2) true and correct copies of all of the foregoing properly addressed to the Solicitor General of the United States, in a duly franked envelope.

Diego Chavez-Tesina

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 238, 239, 240, 241, 242 -- August Term 1987

(Argued October 19, 1987 Decided 1988)

[redacted]

UNITED STATES OF AMERICA,

Appellee,

v.

JOSE DANERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHANKS-CARRERA,

Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHANKS-CARRERA, WILLIAM SALAZAR,

Defendants-Appellants.

Before:

OAKES, CARDAMONE and MAHONEY
Circuit Judges

Defendants William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera appeal from the May, 1987 judgments of conviction for narcotics-related offenses entered by the United States District Court for the Eastern District of New York (McLaughlin, J.) after a jury trial.

Judgments affirmed.

Judge Oakes dissents in a separate opinion.

THOMAS E. NOOTER, New York, New York (Freeman, Nooter & Ginsberg, New York, New York, of counsel), for Appellant Beimar Vallejo.

JOEL B. RUDIN, New York, New York (Mass & Rudin, New York, New York, of counsel), for Appellant Jose Gomez.

BERT H. NISONOFF, Forest Hills, New York, for Appellant Hugo [redacted].

JERALD LEVINE, Jackson Heights, New York, for Appellant Diego Chavez-Tesina.

HARRY C. BATCHELDER, JR., New York, New York, for Appellant William Salazar.

SEAN F. O'SHEA, Assistant United States Attorney, Brooklyn, New York (Andrew J. Maloney, United States Attorney, Eastern District of New York; John Gleeson and Emily Berger, Assistant United States Attorneys, of counsel), for Appellee United States of America.

CARDAMONE, Circuit Judge:

This appeal requires us to decide at what stage in a criminal prosecution a defendant is entitled to the presence of an Article III judge. Appellants urge that a defendant may claim such a right at the commencement of jury selection. There is no doubt that everything has its season, and there is a time when an accused is entitled to the presence of a federal district court judge. But that season does not necessarily come with the commencement of the petit jury selection. In this case, a magistrate presided over the jury selection for the trial of appellants, William Salazar, Diego Chavez-Tesina, Beimar Vallejo, Jose Gomez, and Hugo Shanks-Carrera. They appeal from the May, 1987 judgments of convictions entered against them in the United States District Court for the Eastern District of New York (McLaughlin, J.) for narcotics-related offenses.

FACTS

Appellants' convictions are the result of an undercover investigation into a major cocaine distribution network in New York and New Orleans conducted by the Drug Enforcement Administration (DEA). DEA Special Agent Rene de la Cova cultivated an acquaintance with Jose Danery Garcia, who introduced de la Cova to the defendant Salazar. Salazar and Garcia sold de la Cova two-eighths of a kilogram of cocaine on January 15, 1986. About three weeks later, de la Cova asked Salazar to supply 50 kilograms of cocaine for one of de la Cova's customers. Salazar mentioned that his business partner, a Columbian of Japanese descent who had lived in London would soon be visiting New Orleans to inspect a large shipment of cocaine. This description matched the defendant Chavez-Tesina, a resident of New York. In New Orleans, another DEA agent, [redacted] operation and encountered Chavez-Tesina, who told the agent that he had agreed to deliver cocaine to New York. As de la Cova and Salazar finalized their deal, Salazar made telephone calls concerning it to Chavez-Tesina's residence in New York.

While the large transaction was being arranged, Salazar made or facilitated several other sales of cocaine; only three in particular involved the appellants. On February 6, 1986 Salazar sold one-eighth of a kilogram of cocaine to de la Cova. In another transaction, Salazar contacted the defendant Vallejo and said that he had something "very, very good." Salazar telephoned the defendant Gomez two days later, on March 17, 1986, and asked for "two favors," slang for two kilograms of cocaine, which Gomez agreed to provide. Gomez was seen one hour later carrying a large plastic bag into Salazar's house and later leaving without it. Vallejo was then observed leaving Salazar's house with Salazar. The two drove to Vallejo's house and both entered the house with the bag. Soon thereafter, Salazar exited alone, carrying nothing. Four days later, Vallejo made a small delivery of cocaine to de la Cova and Salazar for their "personal use".

The 50 kilogram deal approached execution. After an agent posing as de la Cova's buyer "flashed" a payment of $1.5 million, Salazar led de la Cova to an apartment in a building that was under surveillance by the DEA. The defendant Shanks-Carrera was observed going inside the building with a [redacted] entered the building to make sure that the cocaine was there, while de la Cova waited in the car. When he came out five minutes later, Salazar was arrested. Agents then entered the building and arrested Shanks-Carrera, who was hiding in the apartment closet. Agents recovered the duffel bag, which contained ten kilograms of cocaine -- the agreed-upon first installment. Chavez-Tesina and Vallejo were both arrested later that day in Queens, New York.

Several days later Gomez attempted to contact Salazar but instead reached de la Cova, who was carrying Salazar's beeper after Salazar's arrest. Gomez was arrested after discussing with de la Cova the March 17th transaction between Gomez, Vallejo, and Salazar -- and verifying that that transaction involved cocaine -- as well as discussing a proposed transaction which he refused to execute without Salazar's permission.

Eleven people, including Garcia, were charged in a 21-count superseding indictment. Six of the defendants were charged for alleged narcotics activities involving Garcia. These defendants never went to trial, some pled guilty, or were severed, or (in one case) fled. The five appellants were tried on nine counts

of the indictment, the broadest of which alleged that Salazar and Chavez-Tesina conducted a narcotics racketeering enterprise in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c) (1982) (Count 2). Salazar, Chavez-Tesina, and Shanks-Carrera were charged with [redacted] with intent to distribute 50 kilograms of cocaine under 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986) (Counts 19 and 20). All but one of the remaining counts involving the appellants dealt with the three separate smaller sales of cocaine in violation of 21 U.S.C. §§ 841, 846 (1982 & Supp. IV 1986): (1) conspiracy and substantive counts against Garcia and Salazar arising out of the January 15th sale of two-eighths of a kilogram of cocaine (Counts 11 and 12); (2) a substantive count against Salazar arising out of the February 6th sale of one-eighth of a kilogram of cocaine (Count 13); and (3) conspiracy and substantive counts against Salazar, Gomez, and Vallejo arising out of the March 17th sale of two kilograms of cocaine (Counts 15 and 16). Finally, Chavez-Tesina was charged with interstate travel in aid of racketeering under 18 U.S.C. § 1952 (1982 & Supp. IV 1986) (Count 14). Each of the offenses alleged in the non-RICO counts was also charged as a predicate act in the RICO count against Salazar and Chavez-Tesina. Thus, the RICO count incorporated the remaining counts against all of the appellants.

Appellants moved unsuccessfully for severance pursuant to Fed. R. Crim. P. 8(b), 12(b), and 14. After jury selection -- presided over by a magistrate -- trial commenced on February 17, 1987 and concluded with the appellants convicted as follows: Salazar for narcotics racketeering, distribution of cocaine, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Chavez-Tesina for narcotics racketeering, illegal interstate travel, possession of cocaine with intent to distribute, and conspiracy to distribute cocaine; Vallejo and Gomez for conspiracy to possess cocaine with the intent to distribute and possession with intent to distribute; and Shanks-Carrera for possession of cocaine with intent to distribute. Shanks-Carrera was acquitted on the conspiracy charge. This appeal followed. We affirm.

DISCUSSION

Appellants collectively and individually raise the myriad of issues common in appeals from multiple defendant trials. Although each will be addressed in turn, the principal issue presented is whether a magistrate -- rather than a district court judge -- may preside during jury selection.

I Jury/Selection by a Magistrate

Judge McLaughlin assigned the task of jury selection to a magistrate pursuant to local rules for the Eastern District of New York. E.D.N.Y. Magistrates R. 1 ("Full-time magistrates shall have jurisdiction to discharge the duties set forth in 28 U.S.C. Sec. 636.") Salazar, Chavez-Tesina, and Gomez objected

to the delegation at the beginning of voir dire and Salazar renewed his objection after the jury had been selected. The district judge upheld the delegation, but offered objectants de novo review of any challenges to jurors for cause which were not sustained by the magistrate. Because the only juror so challenged had been excused by consent, appellants declined the offer. There is no claim of prejudice from the delegation of the voir dire to the magistrate. Rather, appellants argue that allowing a magistrate to preside at the jury selection in a felony case without a defendant's consent contravenes either the Federal Magistrates Act or Article III of the United States Constitution.

A. Statutory Provisions

In 1968 Congress established the office of United States magistrate, which replaced the office of United States commissioner. Federal Magistrates Act, Pub. L. No. 90-578, 82 Stat. 1107, reprinted in 1968 U.S. Code Cong. & Admin. News 1280 (codified as amended at 28 U.S.C. §§ 631-639 (1982 & Supp. III 1985)). Controversy soon developed regarding the scope of a magistrate's duties. See, e.g., Wingo v. Wedding, 418 U.S. 461 (1974) (magistrates not authorized under the Act to conduct habeas corpus evidentiary hearings). As a result, Congress amended the Federal Magistrates Act in 1976 "to clarify and further define the additional duties which may be assigned to a United States Magistrate in the discretion of a judge of the district court." H.R. Rep. No. 1609, 94th Cong., 2d Sess. 2,

reprinted in 1976 U.S. Code Cong. & Admin. News 6162, 6162 [hereinafter 1976 House Report].

As amended, 28 U.S.C. § 636(b)(1)(A)[1]/ provides that a magistrate may hear and determine pretrial matters -- with certain enumerated exceptions -- subject to reconsideration by a district judge when it is argued that the magistrate's order is clearly erroneous or contrary to law. Under § 636(b)(1)(B),[2]/ a magistrate may conduct hearings on specified motions and file proposed findings and recommendations with a district judge. These findings and recommendations are subject to de novo determination by a district judge. Finally, § 636(b)(3) provides that "[a] magistrate may be assigned such additional duties as are not inconsistent with the Constitution and laws of the United States."

Because no contemporaneous objection had been made to the process in United States v. DeFiore, 720 F.2d 757, 765 (2d Cir. 1983), cert. denied, 466 U.S. 906 (1984), we left open the question of whether 28 U.S.C. § 636 permits a district judge to delegate to a magistrate the power to preside over jury selection in felony cases. Haith v. United States, 342 F.2d 158, 159 (3d Cir. 1965) (per curiam) (failure to object to or claim prejudice from delegation waives right to contest delegation), aff'g 231 F. Supp. 495 (E.D. Pa. 1964). Here, contemporaneous objections were made and thus the issue is squarely before us.

Our sister circuits are divided on the proper scope of § 636. The Ninth Circuit has held that a magistrate may -- consistent with both § 636 and the Constitution -- preside over jury selection despite the defendant's objection so long as de novo review is available in the district court. See United States v. Peacock, 761 F.2d 1313, 1318 (9th Cir.), cert. denied, 474 U.S. 847 (1985); United States v. Bezold, 760 F.2d 999, 1002 (9th Cir. 1985), cert. denied, 474 U.S. 1063 (1986); see also United States v. Rivera-Sola, 713 F.2d 866, 874 (1st Cir. 1983) (approving of delegation in dictum). Recently, the Fifth Circuit sitting en banc determined that it was not Congress' purpose to permit such a delegation under § 636 and that therefore a magistrate may not preside in jury selection over defendant's protests. See United States v. Ford, 824 F.2d 1430, 1438 (5th Cir. 1987), cert. denied, 108 S. Ct. 741 (1988).

The first issue to be resolved is what was the aim of Congress when it enacted § 636. Discussing the "additional duties" provision of § 636(b)(3), Congress stated that

> [t]his subsection enables the district courts to continue innovative experimentations in the use of [magistrates]. At the same time, placing this authorization in an entirely separate subsection emphasizes that it is not restricted in any way by any other specific grant of authority to magistrates.
>
> Under this subsection, the district courts would remain free to experiment in the assignment of other duties to magistrates which may not necessarily be included in the broad category of "pretrial matters".

1976 House Report, supra, at 12, reprinted in 1976 U.S. Code Cong. & Admin. News at 6172 (emphasis added); see also S. Rep. No. 625, 94th Cong., 2d Sess. 10 (1976) (same statement).

Appellants contend that delegation of jury selection to a magistrate is precluded by a close textual analysis of § 636. They first argue that Congress' purpose was to permit only pretrial matters to fall within § 636(b) and that jury selection, as an integral part of a trial, is not a pretrial matter. In support of their argument, appellants note the reference to "pretrial matters" in the House Report quoted above. But the language of that Report plainly states that the subsection grants to district courts the freedom to experiment beyond duties traditionally categorized as "pretrial." Hence, even assuming arguendo that jury selection falls on the "trial" side of the line between "trial" and "pretrial" -- a line that is, at best, often blurred -- the legislative history of § 636(b) does not preclude delegation of that task to a magistrate.

Appellants next direct attention to provisions of § 636 that allow magistrates to conduct misdemeanor trials, 28 U.S.C. § 636(a)(3) (1982), and jury or nonjury civil trials, id. § 636(c) (1982 & Supp. III 1985), conditioned in each case upon the consent of the parties. As a matter of consistent statutory interpretation, they argue, it cannot have been Congress' objective to allow magistrate selection of juries in felony cases without consent of the parties. Yet conditioning the

holding of an entire trial before a magistrate on consent is not conclusive in the context of the separate and distinct function of jury selection. Moreover, the legislative history states in so many words that Congress considered the "additional duties" provision to be broad in scope and unrestricted by "any other specific grant of authority to magistrates." Hence, we reject appellants' textual arguments.

We conclude that jury selection delegation to a magistrate is within the scope of § 636(b)(3) and consistent with the Federal Magistrates Act. We are mindful of the familiar canon of construction that requires statutes to be construed so as to avoid constitutional questions. E.g., Commodity Futures Trading Comm'n v. Schor, 106 S. Ct. 3245, 3252 (1986). Nonetheless, "this canon of construction does not give a court the prerogative to ignore the legislative will in order to avoid constitutional adjudication." Id. Here, the legislative will is evident. As the Seventh Circuit stated, "The only limitations on section 636(b)(3) are that the duties be consistent with the Constitution and federal laws and that they not be specifically excluded by section 636(b)(1)." In re Establishment Inspection of Gilbert & Bennett Mfg. Co., 589 F.2d 1335, 1340-41 (7th Cir.), cert. denied, 444 U.S. 884 (1979); see also Ford, 824 F.2d at 1441-42 (Rubin, J., dissenting) (only limit on § 636(b)(3) is Constitution or conflicting law).

B. Constitutional Concerns

The remaining question is whether Article III of the United States Constitution precludes a magistrate from presiding over jury selection in a felony case without the defendant's consent. Article III, § 1 of the Constitution provides that the "judicial Power of the United States, shall be vested in one supreme court and in such inferior Courts as the Congress may from time to time ordain and establish." Moreover, it provides salary protection and tenure for judges appointed to federal courts in order to ensure that the judicial branch retains its independence from the two other branches of government. There are two aspects to the separation of powers doctrine -- a cornerstone of our federal constitutional structure -- that are implicated on this appeal. The first addresses the structural relationship between the three branches of government and the second examines the rights secured to individuals by an independent judiciary. See Schor, 106 S. Ct. at 3256; Pacemaker Diagnostic Clinic, Inc. v. Instromedix, Inc., 725 F.2d 537, 541 (9th Cir.) (en banc) (noting dual components of separation of powers cases), cert. denied, 469 U.S. 824 (1984).

1. Relationships Between the Three Branches

The first, structural component examines the separate and independent relationship between the judiciary and the other two branches of government. Schor, 106 S. Ct. at 3256. Although separation of powers refers to the division of the federal government into three separate branches, the branches are not unconnected from each other. James Madison argued that "unless these departments be . . . blended as to give to each a constitutional control over the others, the degree of separation . . . essential to a free government, can never . . . be duly maintained." The Federalist No. 48, at 308 (J. Madison) (New American Library ed. 1961).

The concept of "blended" branches has been best capsulized by Justice Jackson, who observed how the Constitution diffused power between the three branches to secure liberty, but at the same time contemplated the integration of the three branches so as to have a workable government: "It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). Each branch does not exist in its own separate, airtight compartment. In determining whether an act of Congress violates the integrity of one branch the question focuses on "the extent to which" the statute prevents that branch "from accomplishing its constitutionally assigned functions." Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 443 (1977). Such an approach implements separation of powers concerns and also the theory of checks and balances -- an integral component of the constitutional structure -- which serves to prevent each branch from encroaching on the power of the other. The Federalist, supra, No. 51, at 321-22 (J. Madison).

With this background, we turn first to Congress' purpose. Congress aimed through the Federal Magistrates Act to make federal courts more efficient by the expanded use of magistrates. See H.R. Rep. No. 1629, 90th Cong., 2d Sess., reprinted in 1968 U.S. Code Cong. & Admin. News 4252, 4257; Federal Magistrates Act: Hearings before Subcomm. No. 4 of the House Comm. on the Judiciary, 90th Cong., 2d Sess. 81 (1968) (testimony of Sen. Tydings) ("We hope and think that innovative, imaginative judges who want to clean up their caseload backlog will utilize the U.S. magistrates in these areas and perhaps even come up with new areas to increase the efficiency of their courts."). Although laudable, efficiency does not resolve separation of powers concerns, for "'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives -- or the hallmarks -- of democratic government . . . .'" Bowsher v. Synar, 106 S. Ct. 3181, 3193-94 (1986) (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)).

In the instant case, appellants argue that jury selection is an "inherently judicial" task that cannot be delegated to a non-Article III judge. "[G]uided by the principle that 'practical attention to substance rather than doctrinaire reliance on formal categories should inform application of Article III,'" Schor, 106 S. Ct. at 3256 (quoting Thomas v. Union Carbide Agricultural Prods. Co., 105 S. Ct. 3325, 3336 (1985)), we examine the effect of such a delegation. The Federal Magistrates Act simply enables a district judge to appoint an additional set of eyes and ears to aid in jury selection. At the same time, magistrates are completely subject to Article III judges because the district judges appoint, 28 U.S.C. § 631(a), remove, id. § 631(b), and decide what matters are assigned magistrates, id. § 636(b)(4). Significantly, a trial court is not required to appoint a magistrate to preside over jury selection. Rather, the decision is left entirely to the Article III court's discretion. In sum, the delegation of authority here occurs entirely within the judicial branch, a circumstance which alleviates greatly the underlying structural separation of powers concern with one branch's encroaching upon the power of another. Cf. United States v. Raddatz, 447 U.S. 667, 682-83 (1980) (distinguishing administrative agencies from officers of the court).

Even assuming the delegated task itself might be labelled "inherently judicial," Article III concerns are not necessarily implicated when the task is not delegated conclusively to a non-Article III tribunal. See Raddatz, 447 U.S. at 681-84 (upholding suppression hearing referred to magistrate with review); Mathews v. Weber, 423 U.S. 261, 271-72 (1976) (upholding social security benefit cases referred to magistrate with review); see also Ford, 824 F.2d at 1444-45 (Rubin, J., dissenting) (rejecting "inherently judicial" argument); United

States v. Saunders, 641 F.2d 659, 663 (9th Cir. 1980), cert. denied, 452 U.S. 918 (1981) (same). So long as the "'essential attributes' of judicial power are retained in the Art. III Court," see Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 81 (1982) (plurality opinion of Brennan, J.), the delegation of power in a statute does not contravene Article III.

The availability of de novo review in this case vested the ultimate decision regarding the composition of the jury with the trial court. Thus, the trial court retained the inherently judicial power to make the final decision. Significantly, retention by an Article III court of this power has been considered crucial in Article III cases. In Raddatz, for example, the Supreme Court held that referral of a suppression motion to a magistrate under § 636(b)(1) did not violate Article III or the defendant's due process rights. 447 U.S. at 680-81, 684. Distinguishing the question of whether final decisionmaking power on a suppression motion could be delegated to a non-Article III tribunal, id. at 681, the Court stated that "delegation does not violate Art. III so long as the ultimate decision is made by the district court," id. at 683. As Justice Blackmun commented, there is little threat to the independence and authority of the judicial branch "when the district judge -- insulated by life tenure and irreducible salary -- is waiting in the wings, fully able to correct errors." Id. at 686 (Blackmun, J., concurring); see also Northern Pipeline, 458 U.S. at 81-83 (opinion of Brennan, J.) (discussing Raddatz); Mathews, 432 U.S. at 271 (final decision remains with judge); Fallon, Of Legislative Courts, Administrative Agencies, and Article III, 101 Harv. L. Rev. 915, 933 (1988) (advocating theory "that sufficiently searching review of a legislative court's or [illegible] always satisfy the requirements of article III").

Similarly, the trial judge here was "waiting in the wings" and offered de novo review, which the appellants declined. Nor do appellants claim that de novo review would have been ineffective. Raddatz compels the conclusion that neither delegation of voir dire per se nor delegation under the facts of this case erodes the power and independence of the judiciary. Consequently, we perceive no conflict with the first component of the separation of powers doctrine.

2. Article III Rights

The second component of the separation of powers doctrine safeguards the rights of litigants vis-a-vis the judicial branch. Litigants have a "right to have claims decided before judges who are free from potential domination by other branches of government." Schor, 106 S. Ct. at 3256 (quoting United States v. Will, 449 U.S. 200, 218 (1980)). This component most often arises in the context of a litigant's consenting to a non-Article III forum. E.g., Schor, 106 S. Ct. at 3256-57; Pacemaker Diagnostic, 725 F.2d at 541-42. Here, appellants affirmatively objected to the delegation of voir dire to a

magistrate, thereby rendering of greater import the second component of the doctrine. In cases where consent is absent the second component requires us to view a delegation of jurisdiction from the perspective of the individuals whose liberty is secured by our tripartite system of government. Although many of the same considerations are necessarily at play in both components of the separation of powers doctrine and although both serve to protect the single overall mission of Article III, cf. Schor, 106 S. Ct. at 3266 (Brennan, J., dissenting) ("In my view, the structural and individual interests served by Article III are inseparable."), each emanates from a different perspective.

Applied to the instant case, the second component of the doctrine ensures that whatever right a litigant has to the presence of an Article III judge is effectively safeguarded when jury selection is delegated to a magistrate. While not minimizing the importance of jury selection in the context of a trial, we decline to hold that Article III requires the physical presence of an Article III judge at that precise point in the adjudicatory process. Historically a judge was not required to be present during voir dire or to hear challenges for cause. See Ford, 824 F.2d at 1447 (Rubin, J., dissenting). Appellants argue that an Article III judge is required to be present at trial and refer to cases indicating that trial begins with jury selection. The cases cited focus on a defendant's right to be present at jury selection, see, e.g., Lewis v. United States, 146 U.S. 370, 373-74 (1892), or on when a trial begins for purposes of the Speedy Trial Act, see, e.g., United States v. A-A-A Elec. Co., 788 F.2d 242, 246 (4th Cir. 1986), rather than on a right to an Article III judge. Hence, they are inapposite. The point at which trial begins and particular constitutional

Cf. Press-Enterprise Co. v. Superior Court of Calif., 464 U.S. 501, 509 n.8 (1984) (double jeopardy). Thus, even if we accept appellants' premise that an Article III judge must preside over a trial, it does not necessarily follow that for purposes of Article III trial begins with jury selection.

The availability of de novo review alleviates apprehension that a litigant will be deprived of the tangible benefits ensured by a judicial branch that is separate and independent from the remaining two branches of government. Tacitly acknowledging this point, appellants argue that the lack of an Article III judge's physical presence at voir dire is somehow demeaning to potential jurors. We decline to adopt this debatable hypothesis as a justification for a broad constitutional rule.

In sum, we hold that even absent a defendant's consent the Federal Magistrates Act permits district courts to delegate the task of jury selection in felony cases to a magistrate. Additionally, such a delegation does not contravene Article III of the Constitution where, as here, the district court affords de novo review of unsustained challenges to jurors for cause.

II Single or Multiple Conspiracy

Salazar argues that the indictment charged him with several conspiracies and that he was prejudiced because the evidence at trial proved only a single conspiracy. The issue of the government's indicting for single versus multiple conspiracies arises frequently in criminal jurisprudence. See, e.g., Kotteakos v. United States, 328 U.S. 750, 755 (1946) (convictions reversed because single conspiracy charged, multiple conspiracies proven); United States v. Nersesian, 824 F.2d 1294, 1302-03 (2d Cir.) (evidence properly supported single conspiracy charge), cert. denied, 108 S. Ct. 357 (1987); United States v. Miley, 513 F.2d 1191, 1205-07 (2d Cir.), cert. denied, 423 U.S. 842 (1975); United States v. Borelli, 336 F.2d 376, 378 (2d Cir. 1964), cert. denied, 379 U.S. 960 (1965). Instead of arguing that the government charged a single conspiracy but proved multiple, unrelated conspiracies -- a recurring problem on appeal -- Salazar contends that the reverse situation fatally impaired his trial.

We disagree. Multiple conspiracies exist "unless the evidence of the scale of the operation permit[s] the inference that the persons at a particular level must have known that others were performing similar roles." Miley, 513 F.2d at 1207. The record is devoid of evidence indicating this quantum of knowledge among appellants while involved in the acts that led to their convictions. In fact, were this a case where the government had charged a single conspiracy, we would be hard

pressed to find evidence supporting a jury determination that a single conspiracy actually did exist. Cf. Nersesian, 824 F.2d at 1302 (analyzing evidence in conspiracy case). Having previously admonished the government that it must "cease combining in an alleged single conspiracy, criminal acts loosely, if at all, connected," United States v. Bertolotti, 529 F.2d 149, 151 (2d Cir. 1975), we should not treat the fact that it heeded such advice in this case with stone-faced indifference. Here, the trial court's failure to charge the jury on single versus multiple conspiracies was not error and Salazar's contrary contention is unpersuasive. This does not mean, of course, that the government may arbitrarily jointly try defendants alleged to have engaged in unrelated conspiracies, for the rules governing joinder and severance still apply.

III Joinder and Severance

Salazar, Shanks-Carrera, Vallejo, and Gomez object to the trial court's denial of their motions for severance. It should be noted initially that all of the counts in the indictment concerning the non-RICO appellants were charged also in the RICO count as predicate racketeering acts against Salazar and Chavez-Tesina. Joinder of these defendants in the same indictment was therefore proper under Fed. R. Crim. P. 8(b), even though multiple conspiracies were charged and even though some defendants were not named in all the conspiracy counts, which also constituted RICO predicate offenses, or in the overarching RICO count. See United States v. Berton, 647 F.2d

224, 239-40 (2d Cir.), cert. denied, 454 U.S. 857 (1981); United States v. Weisman, 624 F.2d 1118, 1129 (2d Cir.), cert. denied, 449 U.S. 871 (1980); United States v. Gallo, 668 F. Supp. 736, 748 (E.D.N.Y. 1986), mandamus granted on other grounds, 834 F.2d 283 (2d Cir. 1987); United States v. Castellano, 610 F. Supp. 1359, 1396-97 (S.D.N.Y. 1985). The only question is whether denial of the Fed. R. Crim. P. 14 motions for severance from the joint trial was a clear abuse of the trial court's discretion. Nersesian, 824 F.2d at 1303.

A. Salazar

The essence of Salazar's argument for severance encompasses the issues of proper joinder under Rule 8(b) and of single versus multiple conspiracies. These arguments were rejected above and need not be discussed further. Salazar also contends that he was prejudiced by the admission of conspiracy evidence that related to parties charged in the indictment, but who were not tried. This is not a severance argument -- as appellant contends -- but rather a relevance argument. The trial court admitted the evidence on the ground that it was relevant to show the breadth of the "enterprise" that formed the basis for the RICO count and to show Salazar's knowledge and intent, which he had put in issue. The weighing of relevance against prejudice to see where the balance tips is entrusted to the discretion of the trial court. Salazar does not argue that the trial court acted arbitrarily or irrationally. See United States v. Esdaille, 769 F.2d 104, 108 (2d Cir.), cert. denied, 474 U.S. 923 (1985). Hence, the denial of the severance motion must stand.

B. Shanks-Carrera

Shanks-Carrera urges that the denial of a severance in his case created unfair prejudice, correctly claiming that he was the least implicated in the broad series of transactions that form the nexus of this prosecution. Different degrees of guilt or notoriety among defendants obviously do not mandate separate trials. Nersesian, 824 F.2d at 1304. Further, that Shanks-Carrera was acquitted on the conspiracy count is a strong indication that the jury was capable of separately evaluating each defendant's culpability and that there was no prejudicial "spillover" of evidence. See, e.g., Weisman, 624 F.2d at 1130.

In addition, the relatively small number of defendants, the straightforward nature of the proof, the similarity of the charged offenses, and the short trial all support the trial court's determination that the jury was able fairly to weigh the evidence against each defendant. Nor can it be said that the trial court's denial of Shanks-Carrera's motion for severance resulted in "a miscarriage of justice." United States v. Bari, 750 F.2d 1169, 1177 (2d Cir. 1984), cert. denied, 472 U.S. 1019 (1985). We therefore affirm the denial of Shanks-Carrera's motion for severance.

C. Vallejo and Gomez

For the reasons discussed above concerning Shanks-Carrera's motion for severance, we also affirm the denial of Vallejo's and Gomez's motions for severance.

IV Evidentiary Issues

A. Rule 105 Limiting Instructions

Vallejo and Gomez assert that the failure to grant a severance coupled with the trial court's limiting instructions unduly impaired their trial. The trial court denied Vallejo's

[redacted]

contemporaneously with the admission of each piece of physical evidence, delimiting which defendant(s) the evidence was admissible against. Judge McLaughlin did give contemporaneous limiting instructions when co-conspirator statements were admissible against some -- but not all -- defendants. In addition, the trial court gave a general instruction to the jury in his charge:

> Some of the charges in this case have been made against some of the defendants and not against others. You must decide what the evidence shows about each defendant without considering any evidence that may have been received solely against some other defendant or defendants.
>
> Each defendant is entitled to have the case against that defendant decided solely on the evidence and the law that applies to him.

Appellants argue that Fed. R. Evid. 105, which provides that "when" evidence is admissible against one party but not another, the court "shall" instruct the jury as to the limited admissibility, requires that instructions accompany every exhibit at the time admitted. Although there is some support for the proposition that Rule 105 mandates a contemporaneous limiting instruction when any type of evidence is admitted for a limited purpose, see 21 C. Wright & K. Graham, Federal Practice and Procedure § 5065 (1977 & Supp. 1987), the weight of authority is to the contrary. See United States v. Carson, 702 F.2d 351, 367 (2d Cir.) (trial court instructed jury on numerous occasions to accord each defendant separate consideration; no mention of contemporaneous instruction), cert. denied, 462 U.S. 1108 (1983); United States v. Losada, 674 F.2d 167, 171-72 (2d Cir.) (instructions in charge alone adequately protected against prejudice), cert. denied, 457 U.S. 1125 (1982); see also 1 J. Weinstein, Weinstein's Evidence ¶ 105[05], at 105-44 (1986) ("The jury may be instructed either as the [limited] evidence is admitted or as part of the general charge.") (emphasis added; footnote omitted).

The timing of Rule 105 limiting instructions with regard to physical evidence is best left to the trial court's discretion. See United States v. Oxford, 735 F.2d 276, 280 (7th Cir. 1984); United States v. Dabish, 708 F.2d 240, 243 (6th Cir. 1983). Accordingly, the record must be examined to ascertain whether Vallejo and Gomez suffered any harm from the trial court's refusal to give contemporaneous limiting instructions when admitting each piece of physical evidence that was not relevant to them. See Losada, 674 F.2d at 171-72 (looking for prejudice); Weisman, 624 F.2d at 1130 (same); United States v. Toliver, 541 F.2d 958, 963 (2d Cir. 1976) (same).

We conclude that Judge McLaughlin's limiting instruction in his general charge, together with his contemporaneous limiting

instructions upon the admission of co-conspirator statements, adequately protected appellants. Where, as here, there are a limited number of defendants, the jury is able more easily to separate the evidence admitted against each of them. See United States v. Teitler, 802 F.2d 606, 617 (2d Cir. 1986). Further, the evidence admitted without contemporaneous instruction was physical evidence that lent itself to compartmentalized consideration. See, e.g., Toliver, 541 F.2d at 963 (documents). As a consequence, the refusal of the court to give contemporaneous limiting instructions at each introduction of evidence with limited admissibility did not unfairly prejudice Vallejo and Gomez.

B. DEA Expert Testimony

Appellants object to the admission of a DEA expert's testimony concerning the meaning of certain recorded coded telephone conversations between them. Such testimony is subject to challenge only when the expert interprets and draws conclusions from the evidence instead of simply testifying as to the jargon of the drug trade. See Nersesian, 824 F.2d at 1308; United States v. Brown, 776 F.2d 397, 400-01 (2d Cir. 1985), cert. denied, 475 U.S. 1141 (1986); United States v. Young, 745 F.2d 733, 760-61 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985). Appellants do not allege that the agent's testimony included his interpretations or conclusions. This claim is therefore also without merit.

C. Sufficiency of the Evidence

Chavez-Tesina, Vallejo, and Shanks-Carrera contend that there is insufficient evidence to support their convictions. It is a familiar litany that the standard for appellate review of an insufficiency claim places a "very heavy burden" on the appellant. Losada, 674 F.2d at 173. Our inquiry is whether the jury, drawing reasonable inferences from the evidence, may fairly and logically have concluded that the defendant was guilty beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 317 (1979); United States v. Barnes, 604 F.2d 121, 157 (2d Cir. 1979), cert. denied, 446 U.S. 907 (1980). In making this determination, the evidence must be viewed in the light most favorable to the government, Glasser v. United States, 315 U.S. 60, 80 (1942), and all permissible inferences construed in its favor, United States v. Dazzo, 672 F.2d 284, 288 (2d Cir.), cert. denied, 459 U.S. 836 (1982). In addition, the "[e]xistence of and participation in a conspiracy with the requisite criminal intent may be established . . . through circumstantial evidence." United States v. Sanzo, 673 F.2d 64, 69 (2d Cir.), cert. denied, 459 U.S. 858 (1982). We examine in turn the evidence against each appellant.

1. Chavez-Tesina

Chavez-Tesina's convictions arose primarily out of his involvement in the 50 kilogram transaction. Salazar described his "partner" to de la Cova as a Colombian of Japanese descent who had lived in London. Chavez-Tesina matched the physical

description and possessed a British driver's license and Colombian passport when he was arrested. When Salazar told de la Cova that his partner was travelling in New Orleans, independent evidence established that Chavez-Tesina was in fact then in New Orleans.

More important, there was testimony to the effect that Chavez-Tesina was in New Orleans looking for cocaine that would be acceptable in the New York market. As the transaction approached accomplishment, Salazar made telephone calls to Chavez-Tesina's home, confirmed by a pen register. The subject of these calls was the cocaine transaction. In one call, Salazar referred to the other party as "Diego," Chavez-Tesina's first name. The jury was entitled to believe that this evidence linked Chavez-Tesina to Salazar, the RICO enterprise, and the 50 kilogram deal.

2. Vallejo

Vallejo, a less active participant in the affairs providing the basis for the charges, was convicted of conspiracy to possess cocaine and possession with intent to distribute arising out of the March 17, 1986 two kilogram cocaine sale to de la Cova. Vallejo argues that there was no proof that he was involved in the conspiracy. The evidence, he argues, shows at best mere association with a drug dealer.

Agent de la Cova heard Salazar tell Vallejo on March 15th that he had something "very, very good." From this the jury could reasonably conclude that Salazar referred to cocaine and

that Vallejo comprehended this meaning. Just two days later, in Vallejo's presence, Gomez delivered two "favors" to Salazar. It is beyond dispute that Gomez delivered cocaine because Gomez said shortly before he was arrested that the "favors" were kilograms of cocaine. This cocaine subsequently was transported to Vallejo's house.

Further support for the inference that Vallejo was involved in a narcotics conspiracy and distributed cocaine is the fact that he delivered a small amount of cocaine to Salazar on March 21st -- only moments after Salazar called and asked for some. When he was arrested, Vallejo had a beeper, $2000 in cash, a small amount of drugs and drug paraphernalia, again evidencing that his business relationship with Salazar related to the narcotics trade. See Carson, 702 F.2d at 368. This proof, as well as the reasonable inferences arising from it, supports the jury's finding that Vallejo was a knowing participant in the conspiracy.

3. Shanks-Carrera

Shanks-Carrera was alleged to be a supporting player in the 50-kilogram transaction. It was he whom the DEA observed carrying a duffel bag -- later found to be filled with cocaine -- into the apartment arranged as the delivery site. Shanks-Carrera was acquitted of conspiracy, but convicted of possession.

Testifying at trial, he claimed that he had no knowledge that the duffel bag contained cocaine. Appellant explained that

incriminating statements made at the time of his arrest -- and hiding when DEA agents arrived -- were the results of fear and a desire to protect his brother, who allegedly gave him the duffel bag. The jury was in a better position to assess these issues of credibility. Viewing the evidence in the light most favorable to the government, we find it sufficient to establish that the appellant possessed cocaine with the intent to distribute it.

CONCLUSION

Accordingly, for the reasons discussed above, the judgments of conviction are affirmed.

FOOTNOTES

1/ Section 636(b)(1)(A) provides:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A) (1982).

2/ Section 636(b)(1)(B) provides:

> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

28 U.S.C. § 636(b)(1)(B) (1982). Section 636(b)(1) further provides that

> [a] judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate.

Id. § 636(b)(1).

OAKES, Circuit Judge (dissenting):

I respectfully dissent.

I agree with the majority of the judges in the Fifth Circuit sitting en banc that, at the very least, the practice of [illegible] raises serious constitutional questions. See United States v. Ford, 824 F.2d 1430 (5th Cir. 1987) (en banc), cert. denied, 108 S. Ct. 741 (1988). Selection of a petit jury to try a felony case has both particular and systemic importance; it implicates not only the defendant's Fifth and Sixth Amendment rights and provides the foundation upon which the remainder of the trial is built, but is essential, as Judge Patrick Higginbotham reminded us, "because the impartiality of the adjudicator goes to the very integrity of the legal system." Id. at 1435 (quoting Gray v. Mississippi, 107 S. Ct. 2045, 2056 (1987)). The process of voir dire is especially significant; not only is the peremptory challenge a necessary part of trial by jury, Swain v. Alabama, 380 U.S. 202, 219 (1965), but the prosecutor's use of peremptory challenges may violate other constitutional requirements. For example, a prosecutor's challenges based on race implicate the Equal Protection clause. Batson v. Kentucky, 476 U.S. 79, 88-89 (1986). And, while double jeopardy does not attach until the jury is sworn, Crist v. Bretz, 437 U.S. 28, 35 (1978), the Sixth Amendment rights of a defendant to a speedy and public trial, accord Speedy Trial Act, 18 U.S.C. §§ 3161-3174 (1982 & Supp. IV 1986), to be present while a jury is selected, Lewis v. United States, 146 U.S. 370, 376 (1892); United States v. Crutcher, 405 F.2d 239, 242-43 (2d Cir. 1968), cert. denied, 394 U.S. 908 (1969); Fed. R. Crim. P. 43(a), and to the assistance of counsel during jury selection, see Swain v. Alabama, 380 U.S. 202, 209 (1977), all attach before or at the time jury selection begins. Since the whole purpose of voir dire is to obtain an impartial jury, one that is "capable and willing to decide the case solely on the evidence before it," Smith v. Phillips, 455 U.S. 209, 217 (1982), it follows that the right to such a jury attaches from the beginning of the selection process.

Are these constitutional concerns met by the district judge's power to conduct a de novo review of the voir dire process, here specifically reserved but not utilized? Does that power satisfy the constitutional concerns above noted? The answer, I feel, is at best maybe. The district court's review of a magistrate's rulings on challenges would surely be difficult, as Judge Higginbotham pointed out in United States v. Ford, 824 F.2d at 1436-37, and would undoubtedly lead to appeals on the issue to circuit courts. Perhaps the district court has the inherent power simply to conduct a voir dire a second time. See United States v. Raddatz, 447 U.S. 667 (1980). But this approach presents serious practical problems; for example, the second interrogation of a potential juror would be likely to put that individual on the defensive, making a reenactment of the

original voir dire impossible. See United States v. Ford, 824 F.2d at 1437; but see id. at 1446 (Rubin, J., dissenting). In any event, no clear-cut answer can be forthcoming unless and until the Supreme Court decides the constitutional question.

The practice of delegating jury selection to a magistrate, absent the consent of the defendant and the Government, is to my mind a bad one. Intending no offense toward magistrates, delegation demeans the process, making it appear essentially clerical in nature. At the very least it impedes the judge from personally instilling in the jury at the start of the trial a sense of the importance of the work the jury is about to perform. It is apt to make the jury less attentive to the judge during the trial, and the judge less sensitive to the problems of the individual jurors, as well as to the overall chemistry of the jury itself. For due process also demands, as well as a disinterested jury, "a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." Smith v. Phillips, 455 U.S. at 217. Events can occur during the magistrate's voir dire that would require the judge's review, but he would be disadvantaged because they occurred outside his presence. In addition, a defendant might feel shortchanged, and left with the impression that he, and his case, are of lesser consequence because the judge himself did not participate. The Constitution instructs us that every criminal defendant, regardless of his status in

the community or the nature of the crimes with which he is charged, is important and entitled not only to the best practicable process but also entitled reasonably to feel as if he has received the fairest practicable process.

I know others disagree with me, but in the judicial district such as the Eastern District of New York where the judge, rather than the attorneys, conducts the voir dire -- is one that can save much judicial time. It is a practice that is not followed in the Southern District of New York, and in the districts in which it is used it is exercised without established rules for determining when voir dire should be assigned and without established procedures for review. I would, in the exercise of our supervisory power, prohibit it except, possibly, when the parties consent, and then only pursuant to rules controlling the district court's review. By so doing, I would incidentally avoid the problems of statutory and constitutional interpretation that my colleagues solve with a sweep that leaves me, as I suggest, unconvinced. I therefore dissent.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 4th day of August one thousand nine hundred and eighty- eight

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UNITED STATES OF AMERICA,

Appellee,

-v.-

JOSE GARERY GARCIA, DAMARIS SANCHEZ, WILLIAM SALAZAR, FABIO PORRAS, DIEGO CHAVEZ-TESINA, ADELA GOMEZ, BEIMAR VALLEJO, JOSE GOMEZ, JAIME NEWBOLD, YOLANDA MARTINEZ, HUGO SHARKS-CARRERA,

Defendants,

DIEGO CHAVEZ-TESINA, BEIMAR VALLEJO, JOSE GOMEZ, HUGO SHARKS-CARRERA, WILLIAM SALAZAR,

Defendants-Appellants.

UNITED STATES COURT OF APPEALS
FILED
AUG 4 1988
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

Docket Nos 87-1243, 87-12
87-1245, 87-12
87-1264

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellants WILLIAM SALAZAR, HUGO SCHARKS-CARRERA, and JOSE GOMEZ.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED. Judge Oakes dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

86 CR 266

Plaintiff,

-against-

JOSE GOMEZ, ET AL.,

Defendants.

----------X

U.S. Courthouse
Brooklyn, N.Y.

February 9, 1987

JURY SELECTION BEFORE A. SIMON CHREIN,
CHIEF MAGISTRATE

APPEARANCES:

FOR THE PLAINTIFF
SEAN O'SHEA, ESQ., AUSA

FOR DEFENDANT SALAZAR
HARRY BATCHELDER, ESQ.

FOR DEFENDANT TESINA
JERRY LEVINE, ESQ.

FOR DEFENDANT VALLEJO
FREDERICK MILLER, ESQ.

FOR DEFENDANT GOMEZ
PAUL WARBURGH, ESQ.

FOR DEFENDANT CARSERA
BURT NISINOFF

FRED LORBER, CSR
OFFICIAL COURT REPORTER
718 330 2168

IE COURT: Ready to start, gentlemen?

MR. O'SHEA: We are missing a chair.

THE COURT: Take a chair from another table. Is that a major logistical problem? Let me swear the interpreters. Are both interpreters here?

R. VAN NORMAN WHITFORD and JOSE A. MONTALDO, were duly sworn as interpreters by the Court.

THE COURT: Gentlemen, I understand that when the question was posed to some or all of the defendants as to whether or not they wished to consent to a Magistrate selecting the jury, with the understanding that the case would nonetheless be tried by an Article 3 Judge, that some defendants have objected to the procedure of a Magistrate jury selection. Is that correct?

MR. WARBURGH: That is my understanding, yes.

THE COURT: Do all of the defendants object, or just some?

MR. LEVINE: On behalf of my client, he objects to the jury selection before the Magistrate.

MR. BATCHELDER: On behalf of Mr. Salazar, Mr. Salazar objects, Your Honor.

THE COURT: Do any other defendants object to a Mag istrate selecting the jury?

MR. WARBURGH: I need an interpreter. Mr. Gomez objects.

T. COURT: Thatleaves me with just two additional--

MR. MILLER: Let's have a severance and we will try our own case.

THE COURT: I am not talking about a severance. Mr. Salazar has objected, is that correct, Mr. Batchelder?

MR. BATCHELDER: That is correct, sir.

THE COURT: Mr. Levine, Mr. Tesina has objected?

MR. LEVINE: I did that originally, Judge.

MR. MILLER: No objection.

THE COURT: Mr. Warburgh, your client has objected?

MR. WARBURGH: Mr. Gomez objected.

THE COURT: Mr. Nisinoff?

MR. NISINOFF: He has not objected, Your Honor.

THE COURT: Mr. O'Shea, what is the government's view as to whether we can proceed?

MR. O'SHEA: Your Honor, I believe the view that you espoused earlier in your own courtroom, that the selection of the jury by yourself, the Magistrate, is perfectly proper. The government's position is that we should proceed with the jury selection.

THE COURT: I intend to proceed with the selection. In the event Judge McLaughlin decides that he

would prefer to s ect the jury, either on his own initiative or at the request of any counsel, inasmuch as no juror will be sworn as a trial juror, they will, of course be sworn for the voir dire, there would be no jeopardy. There would be no prejudice and Judge McLaughlin would be free to discharge whatever jury we select today.

My own view of the matter is that the selection of the jury, even over the objection, or without the consent of the defendants has been approved in other matters within this Circuit.

Yes, Mr. Batchelder?

MR. BATCHELDER: Do I understand it that the Second Circuit has passed on the propriety of Magistrates over the objection, or whether--

THE COURT: No, they have approved the procedure, my understanding is.

MR. BATCHELDER: They have not, as I understand it, approved the procedure if the defedant wishes to, because the Magistrate Act has been construed narrowly not to confer that power, as I understand it.

THE COURT: Mr. Batchelder, what I have indicated I will do, unless both sides object, is to proceed to select the Jury and you can raise whatever objection to the panel selected and to the manner of its selection before Judge McLaughlin on the 17th when the trial begins.

If Judge McLaughlin or in fact I would ask that you bring it to Judge McLaughlin's attention at the close of this selection process. If he chooses to select the jury by himself, then he is free to do so.

MR. BATCHELDER: Your Honor, I don't--

THE COURT: You have your exception.

MR. BATCHELDER: I realize I am as anxious as Your Honor to bring this matter to a conclusion, but in defense of my client's interests, Your Honor, I think it would be a brave person, Judge McLaughlin included, who after having wasted three, four hours of what we are doing here, to automatically say, no, I don't think Magistrate Chrein has the power, so therefore, we are going to go ahead.

I am submitting if my client objects to jurisdiction, as I understand the Magistrate Act, unless my client consents, and you do not have jurisdiction to do what we are about to embark on, and that is all the record I am making.

THE COURT: Does anybody feel that some inquiry should be posed to Judge McLaughlin now?

MR. MILLER: Judge--

THE COURT: I see no need for such an inquiry. I believe the matter has been dealt with. I don't think there was a specific central issue to any case, but jury selections by Magistrates have been approved in both this

Circuit and other Circuits. I unfortunately do not have the cases at my fingertips at this point.

MR. O'SHEA: I don't have the cases either, Your Honor. But I believe you are correct. I have no objection, however, if the Court wishes to inquire of Judge McLaughlin what he would like to do at this point. It is entirely up to the Court.

THE COURT: Mrs. Culman, can you get me Judge McLaughlin's law clerk on the phone?

THE CLERK: Yes, sir.

THE COURT: In fact, I am going into chambers and deal with it myself. Are they getting somebody? I will speak to him. They are coming in. Yes, Mr. Warburgh?

MR. WARBURGH: We have one interpreter in the Courtroom.

THE COURT: There is a machine.

MR. WARBURGH: Yes, I understand. There came a time here when I needed an interpreter to speak to my client briefly, privately, and he had to stop doing what he was doing to come over and aid me. I don't think it is important now during jury selection process.

THE COURT: Then I will make a note of that and we will tell the Judge. You can raise that with Eileen Levine before the trial. All right, I am going to proceed to select the Jury. Judge McLaughlin's view of the law was

the same as mine. Those parties that object, and we have recorded on the record who has objected and who has consented, that those parties who object are deemed to have an objection. I assume the ground is that jury selection being part of the trial, and a Magistrate not being permitted even with waiver to try a felony case, that this is a part of the trial and the parties insist that all aspects of the trial or those objecting parties insist that all aspects of the trial be conducted by an Article 3 Judge, your exception is noted and when the jury comes up we will proceed to pick the jury.

I would ask that any friends or relatives or spectators stay within the first two rows on the right side of the room. I intend to fill the remainder with prospective jurors. So if any of you have, if there are any spectators or people who are not prospective jurors, sit in the first row alone where the three people are seated now.

MR. NISINOFF: Stay right there.

THE COURT: Fill up my right side first. Are those two gentlemen deputy marshals?

A VOICE: Yes, sir.

THE COURT: Could you possibly position yourself over those two benches. I intend to use those benches for prospective jurors. There must be an extra chair or two thatyou can use. Have you phoned for the jurors yet?